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10/529,016	11/04/2005	Anthony Durrell	13793-3	8806
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GISHNOCK, NIKOLAI A				
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/529,016

Applicant(s)

DURRELL, ANTHONY

Examiner

NIKOLAI A. GISHNOCK

Art Unit

3715

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 24 March 2005.
2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-60 is/are pending in the application.
4a) Of the above claim(s) _____ is/are withdrawn from consideration.
5) ☐ Claim(s) _____ is/are allowed.
6) ☒ Claim(s) 1-60 is/are rejected.
7) ☐ Claim(s) _____ is/are objected to.
8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
10) ☒ The drawing(s) filed on 24 March 2005 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/5508)
Paper No(s)/Mail Date 11/4/2005
4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____

DETAILED ACTION

Drawings

1. The drawings are objected to under 37 CFR §1.84(m) because Figures 2a-e, 3a-c, 4a-b, 5a-b, 6a-b, 7a-b, 9, 14, & 15 have dark borders and heavy black shading that prevents legible reproduction. Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Information Disclosure Statement

2. The information disclosure statement filed 11/4/2005 fails in part to comply with 37 CFR 1.98(a)(2), which requires each non-patent literature publication or that portion which caused it to be listed and all other information or that portion which caused it to be listed. It has been placed in the application file, but the information referred to therein that fails to comply has not been considered.

Claim Rejections - 35 USC § 101

3. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

4. Claims 1-28 are rejected under 35 U.S.C. §101. In order to be considered patent eligible, a claimed process must contain sufficient ties to a machine, article of manufacture or a composition of matter. See *In re Comiskey*, 84 USPQ2d 1670 (Fed. Cir. 2007) and *In re Bilski*, 88 USPQ2d 1385 (Fed. Cir. 2008). When an abstract concept has no claimed practical application, it is not patentable. The Supreme Court has reviewed process patents reciting algorithms or abstract concepts in claims directed to industrial processes. In that context, the Supreme Court has held that a claim reciting an algorithm or abstract idea can state statutory subject matter only if, as employed in the process, it is embodied in, operates on, transforms, or otherwise involves another class of statutory subject matter, i.e., a machine, manufacture, or composition of matter. "Identifying the apparatus" requires that the process claim explicitly recite the particular machine or apparatus, or recite a step that inherently involves the use of a particular machine or apparatus. In the instant method claims, no apparatus, such as a computer, is claimed for implementing the method; thus the claimed method seems to be a series of purely abstract mental steps.

5. Claim 59 is rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter. Computer programs claimed as listings and data structures not claimed as embodied in computer-readable media are descriptive material per se, and are non-statutory because they do not define any structural or functional interrelationships between the program and/or data structure and other elements of a manufacture or machine. The claims fail because they are not directed to a process that permits the claimed functionality to be realized. See MPEP 2106.01 I.

Specification

6. The disclosure is objected to as failing to comply with the written description requirement. Adequate description was not found in the disclosure for subject matter recited in claim 11; specifically, where the subject is a memory or a hope for the future. Applicant is required to amend the specification to include these items. No New Matter shall be entered.

Claim Rejections - 35 USC § 112

7. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

8. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

9. Claims 1-60 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claims contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. Claims 1, 29, 59, & 60 recite "representing a selected mood state" and "represent[ing] the proportion that each of a number of primary moods contributes to the selected mood state." It is unclear at what point a mood state is selected, or if the modifier "selected" is intended to mean "particular".

10. Claims 1-60 are further rejected under 35 U.S.C. 112, first paragraph. The specification, while being enabling for allowing a person to select a proportion of several primary moods that contribute to their state, does not reasonably provide enablement for interpretation of the graphical representations. The specification does not enable any person skilled in the art to

which it pertains, or with which it is most nearly connected, to make or use the invention commensurate in scope with these claims. Regarding the graphical representations of Figures 9-17, it is not clear whether the primary moods groups Happy and Sad, or Fear and Anger are meant to be mutually exclusive (being plotting on positive and negative scales of Cartesian axes of "mood compass", or in the balancing "fulcrum" representation"), or felt simultaneously or in ambivalence (such as in the "mood pie" "mood ring", the "quadrangle", and the FASH index). It is unclear exactly how a person should go about accurately quantifying these emotions individually or in mixture. No mechanism for standardizing these emotions on any of the claimed graphical representation is proffered other than generating statements, such as "How I now feel about my mother." in Figure 4b. It is unclear how displaying these foci allow a person to use the claimed method to determine what proportion of each primary mood they feel.

11. Claims 3-28 and 30-58 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The phrase "and/or" recited in claims 3, 6, 30, & 46 renders the claims indefinite because it is unclear whether the limitations following the phrase are part of the claimed invention. See MPEP § 2173.05(d). Claims 4, 5, 7-28, 30-45, & 47-58 inherit this deficiency.

12. Claim 8 is further rejected under 35 U.S.C. 112, second paragraph. Claim 8 recites "wherein the person is asked to assign a color to four primary colors." It is unclear whether the color that is assigned to the four moods is the same color or a different color than the color selected to represent one mood in antecedent claim 7.

13. Claims 1-60 are further rejected under 35 U.S.C. 112, second paragraph. Claims 1, 3, 12, 23, 29, 30, 42, 59, & 60 recite the limitation "the proportion that each of a number of primary moods contributes." There is insufficient antecedent basis for "the proportion" in the claims.

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Claim 2 recites "the result" in line 3. There is insufficient antecedent basis for this limitation in claim 1. Claims 19-21 recite "the Cartesian space". There is insufficient antecedent basis for these limitations in claims 1-3 & 7-11. Also, claim 12 recites "the four selected colors" in line 3. However, claim 8 recites "a color". There is insufficient antecedent basis for this limitation in claims 1-3 & 7-11.

14. Regarding claims 29 & 31, the limitations of "a means for graphically representing the proportion that each of a number of primary moods contributes to the selected mood state" of claim 29 does not meet the stipulations of the sixth paragraph of 35 U.S.C. §112, because the See MPEP 2181 and 35 U.S.C. 112, sixth paragraph. An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof"; see also *B. Braun Medical*, 124 F.3d at 1424, 43 USPQ2d at 1900. Claims 31 & 32 explicitly recite the corresponding computer and display structures; thus, the claims are improper under 112 ¶6, and hence are rejected under 112, second paragraph. Claim 29 is further construed as a "single means claim", and is improper because it fails to recite "an element in a claim to a combination", as required under 112 sixth paragraph.

15. Claims 59 & 60 will be treated as invoking USC 112 sixth paragraph. The claimed "graphical representation means" is understood to refer to the visual display device of Para. 0038.

Claim Rejections - 35 USC § 102

16. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

17. Claims 1-7, 29-36, 39-41, 59, & 60 are rejected under 35 U.S.C. 102(e) as being anticipated by Glenn et al. (US 6,607,390 B2), hereinafter known as Glenn.

18. Glenn teaches a system, method, computer program, and computer-readable medium for graphically representing a selected mood state of a person (In a computer system having a storage device, a method for gathering clinical data useful in the clinical analysis and treatment of mood disorders, including such steps as displaying a main menu including a multiplicity of icons depicting inquiries to be answered by a patient; and, storing the patient's answers to the inquiries as clinical data generated on a regular basis by the patient. The method further includes selecting a point on a scale depicting the patient's current mood, Abstract), the method comprising the steps of: (a) presenting a graphical representation means to the person (graphical user interface, 3:17-18); and (b) having the person use the graphical representation means to graphically represent the proportion that each of a number of primary moods contributes to the selected mood state (FIG. 10 shows an example of the mood dialog box for a female with VAS scale 1001 for entering mood, 8:51-56) [Claims 1, 29, 59, & 60].

19. Glenn teaches a step of: (c) displaying the result of the graphical representation (also at 8:51-56) [Claim 2].

20. Glenn teaches wherein the person can use color and/or dimension to graphically represent the proportion that said each of a number of primary moods contributes to said selected mood state (Mood data is entered using a VAS scale between 0 and 100. The most

extreme feelings of depression and mania the patient has ever experienced define the anchor points. The patient slides the scale to the number that best represents mood over the past 24 hours, in relation to these anchor points, 6:24-35; sliding a scale is understood to be using a dimension to represent a proportion between 0 and 100) [Claims 3 & 30].

21. Glenn teaches wherein the steps are performed in combination with input received from a physician (physician's office may have a computer with a training system and a computer for system administration. The system administration computer is used to enroll patients, receive and analyze data and display or print reports, 5:3-6) [Claim 4].

22. Glenn teaches Claim wherein the person is required to input identification details prior to step (b) (The patient starts up the software and enters their password. The process then decrypts the patient's data file and verifies that the password is correct. After this, the main menu is displayed and updates are made to the entry status for the current date. The entry status graphically displays whether the patient completed entry of all required data in each major section for mood, sleep, and medications, 5:57-67) [Claims 5 & 34].

23. Glenn teaches wherein the identification details include the person's name, address, age, and/or identifier number (patient's name, 8:5-16) [Claim 6].

24. Glenn teaches a step of displaying a select menu where the person selects which of a plurality of colors is representative to them of a particular primary mood (Decision block 502 allows changes to the system configuration. If the response to decision block is yes, block 503 sets system parameters, including printing in color, 7:3-13; see also Configure Program Parameters, Figure 5, Items 502 & 503) [Claims 7 & 35].

25. Glenn teaches wherein the system is an electronic device selected from the group comprising a desktop computer, a laptop computer, a notebook type computer, a personal

organizer, a handheld game device, and a cellular telephone (desktop computer, 5:11-14) [Claim 31].

26. Glenn teaches wherein the electronic device has a microprocessor, a visual display device, an input device, and a data storage device (8:44-50 & 11:19-45) [Claim 32].

27. Glenn teaches wherein the electronic device uses program code to run a program on the device that allows a person to graphically represent the said selected mood state (11:19-45) [Claim 33].

28. Glenn teaches wherein the Select Menu comprises the display of a plurality of blocks of different color on the visual display device, from which the person selects colors that are considered representative of each of the primary moods (7:3-13; the system configuration dialog is understood to be a menu for default color selection) [Claim 36].

29. Glenn teaches wherein details of said selected mood state are enterable into the electronic device using the input device (5:57-67) and stored in the data storage device for later retrieval or comparison with other tests (Every month, or at a frequency determined by their physician, the patient returns data to the system administrator computer, either by E-Mail over the Internet or by diskette. The data from the patient is analyzed and reports are displayed and printed. If the patient is part of a research study, data from the physician site can be aggregated with data from other patients and study sites for statistical analysis, 5:24-30) [Claim 40].

30. Glenn teaches wherein the input device is selected from the group comprising a keyboard, a keypad, a mouse, a joystick, a stylus, and a touch screen (3:11-62; a computerized graphical user interface, with point-and-click selecting, inherently describes mouse input) [Claim 41].

Claim Rejections - 35 USC § 103

31. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

32. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

33. Claims 8-28, 37, 38, & 42-58 are rejected under 35 U.S.C. 103(a) as being unpatentable over Glenn.

34. Glenn teaches all the features of claims 1, 2, 3, 7, 29-33, 35, & 36, as demonstrated above. What Glenn fails to teach is wherein the person is asked to assign a color to four primary moods [Claims 8 & 37], wherein the four primary moods are "Fear", "Anger", "Sad" and "Happy" [Claims 9 & 38]. However, Glenn teaches selecting display colors (7:3-13) and selecting from two primary moods, including depression, understood to be a measure of Happy vs. Sad; and mania, understood to be a measure of Fear and Anger (6:25-36). Applicant further discloses in the specification at Para. 0041-48 that alternative presentation moods and colors is envisaged. Thus, Applicant has not disclosed that merely rating additional moods or assigning more colors to moods solves any stated problem or is for any particular purpose over selecting a mood or color representative to the person, as it would be useful to some people to have more or less moods to consider, and consequently require a larger set of colors to represent unique moods.

Moreover, it appears that the colors and moods taught by Glenn or the Applicant's instant invention would perform equally well for keeping a record of a person's mood for analysis by the person or their physician. Accordingly, it would have been obvious to one of ordinary skill in the art, at the time the invention was made, to have modified the graphical representation of Glenn such that the moods to be represented were Happy, Sad, Fear, or Anger, with each mood represented in a different color, because such a modification would have been considered a mere design choice, which fails to patentably distinguish over Glenn [Claims 8, 9, 37, & 38].

35. Glenn teaches wherein step (b) comprises coloring in a shape of pre-defined area with the four selected colors [Claims 12 & 43], with the proportion of the colors being representative of the proportion of how much that primary mood contributes to the selected mood state (6:16-36, sliding the colored bar as in Figure 10 is understood to be coloring in the pre-defined bar area) [Claims 12 & 42], wherein the person selects a primary mood and then the person is asked to color in a portion of that area that is representative of how much that primary mood contributes to the selected mood state, the process being repeated for each of the primary moods (5:48-56) [Claim 44]. Glenn teaches wherein a percentage score is allocated to each primary mood based on the graphical representation such that the total score adds to 100 (Mood data is entered using a VAS scale between 0 and 100) [Claims 25 & 55]. Glenn teaches wherein step (b) comprises plotting values on a Cartesian plane [Claims 14 & 47], with each axis of the plane being representative of primary moods [Claims 14 & 48], the person selecting a number on a scale that is representative of the degree to which each of the primary moods contributes to the selected mood state and plotting these numbers on the respective appropriate axes of the Cartesian plane [Claim 15] (6:16-36; see also statistics graphs of 9:7-10:54 and Figures 13-15) [Claims 12-21, 23-28, 42-45, 47-53, & 55-58].

36. The particular representation of the graphical image claimed, wherein the predefined area is in the shape of a circle and the resulting graphical representation is a pie chart [Claims 13 & 45], wherein a FASH (Fear/Anger/Sad/Happy) index is prepared based on said scores [Claims 26 & 55], wherein the FASH index is used to form a still further graphical representation of the selected mood state of the person [Claim 56], wherein said scores are used to form a further graphical representation comprising two sets of balanced arms, with variable length and/or color, with a first arm supporting the fulcrum of a second arm, the first arm being representative of the primary moods "fear" and "anger" and the second arm being representative of the primary moods "happy" and "sad" [Claims 27 & 57], where the determined score for the primary moods "fear" and "anger" are the same, the first arm will be graphically depicted as evenly balanced and where the determined score for the primary moods "happy" and "sad" are the same, the second arm will be graphically depicted as evenly balanced [Claims 28 & 58]; wherein the positive side of the y-axis is representative of the primary mood "Happy", the negative side of the y-axis is representative of the primary mood "Sad", the positive side of the x-axis is representative of the primary mood "Fear" and the negative side of the x-axis is representative of the primary mood "Anger" [Claims 16 & 49], wherein a colored line is drawn from the origin of the Cartesian plane to each of the plots made on the Cartesian plane [Claims 17 & 50], and wherein the plots made on the Cartesian plane are used to form a quadrangle that is formed by joining the plots made on the Cartesian plane [Claims 18 & 51], selecting a number on a scale that is representative of the degree to which each of the primary moods contributes to the selected mood state and plotting these numbers on at least some of the axes of the Cartesian space [Claim 19], wherein one or two of the primary moods are plotted on a z-axis of the Cartesian space [Claims 20 & 52], wherein the plots made on the Cartesian space are joined by lines to form a three-dimensional representation of the mood state [Claim 21] or

wherein step (a) comprises presenting the person with a set of colored rings of varying diameters and step (b) comprises the person selecting a ring color representative of a particular primary mood and then selecting from a range of sizes of rings of that selected color a ring of a particular diameter representative of the proportion that that primary mood contributes to the selected mood state [Claim 23], wherein the person uses a set of concentric rings and puts them together by starting with what they regard as their predominant primary mood about said subject and then by working inwardly places smaller diameter rings representative of the other primary moods within the firstly selected largest ring to form a graphical representation of their mood state [Claims 24 & 53], are all mere matters of nonfunctional descriptive material, which, although considered herein, are not given appreciable patentable weight, absent a new and unobvious functional relationship between the subject matter and the display substrate. See *Lowry*, 32 F.3d at 1583-84, 32 USPQ2d at 1035; *In re Ngai*, 367 F.3d 1336, 70 USPQ2d 1862 (Fed. Cir. 2004); and MPEP 2106.01 [Claims 12-21, 23-28, 42-45, 47-53, & 55-58].

37. Glenn teaches prior to step (b), a step where the person thinks about or focuses on a selected mood state (6:16-36; obviously, a patient must think about and focus on their mood in order to select it) [Claims 10 & 39].

38. Glenn teaches wherein the subject is selected from the group comprising their workplace, their human relationships, a memory, a hope for the future, school, sport, family members, a bully, or a particular friend (window for entering optional significant life events field, 8:51-56; "minor car accident" entered in Figure 10, Item 1002; these are understood to be human relationships) [Claim 11].

39. Glenn teaches wherein the process is repeated on one or more occasions over a period of time, with the various graphical representations being stored for later retrieval and/or comparison (Every month, or at a frequency determined by their physician, the patient returns

data to the system administrator computer, either by E-Mail over the Internet or by diskette. The data from the patient is analyzed and reports are displayed and printed. If the patient is part of a research study, data from the physician site can be aggregated with data from other patients and study sites for statistical analysis, 5:48-56) [Claims 22 & 46].

40. Glenn teaches wherein the electronic device analyses the graphical representations and develops statistical analyses thereof (5:48-56) [Claim 54].

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to NIKOLAI A. GISHNOCK whose telephone number is (571)272-1420. The examiner can normally be reached on M-F 11:00a-7:30p EST (8:00a-4:30p PST).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Xuan M. Thai can be reached on 571-272-7147. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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/N. A. G./

Examiner, Art Unit 3715

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Supervisory Patent Examiner, Art Unit 3715